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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 130104012-3777-02]

RIN 0648-BC88

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species;
Bigeye Tuna Catch Limit in Longline Fisheries for 2013 and 2014

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act) to establish a catch limit of 3,763 metric tons (mt) of bigeye tuna (Thunnus obesus) for vessels in the U.S. pelagic longline fisheries operating in the western and central Pacific Ocean (WCPO) for each of the calendar years 2013 and 2014. The limit does not apply to vessels in the longline fisheries of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands (CNMI). Once the limit of 3,763 mt is reached in 2013 or 2014, retaining, transshipping, or landing bigeye tuna caught in the area of application of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), which comprises the majority of the WCPO, will be prohibited for the remainder of the calendar year, with certain exceptions. This action is necessary for the United States to satisfy its obligations under the Convention, to which it is a Contracting Party.

DATES: This rule is effective [Insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Copies of supporting documents prepared for this final rule, including the regulatory impact review (RIR) and the Supplemental Information Report prepared for National Environmental Policy Act (NEPA) purposes, are available via the Federal e-Rulemaking Portal, at www.regulations.gov (search for Docket ID NOAA-NMFS-2013-0090). Those documents, and the small entity compliance guide prepared for this final rule, are also available from NMFS at the following address: Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Regional Office (PIRO), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814-4700. The initial regulatory flexibility analysis (IRFA) and final regulatory flexibility analysis (FRFA) prepared under the authority of the Regulatory Flexibility Act (RFA) are included in the proposed rule and this final rule, respectively.

FOR FURTHER INFORMATION CONTACT: Rini Ghosh, NMFS PIRO, 808-944-2273.

SUPPLEMENTARY INFORMATION:

Background

On June 18, 2013, NMFS published a proposed rule in the Federal Register (78 FR 36496) to revise regulations at 50 CFR part 300, subpart O, to implement a decision of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC or Commission). The proposed rule was open to public comment through July 18, 2013.

This final rule is issued under the authority of the WCPFC Implementation Act (16 U.S.C. 6901 et seq.), which authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is

operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the WCPFC. The authority to promulgate regulations has been delegated to NMFS.

This final rule implements for U.S. fishing vessels the longline bigeye tuna catch limit established in WCPFC Conservation and Management Measure (CMM) 2012-01, “Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna in the Western and Central Pacific Ocean.” The preamble to the proposed rule includes detailed background information, including on the Convention and the WCPFC, the provisions of CMM 2012-01 being implemented in this rule, and the basis for the proposed regulations, which is not repeated here.

New Requirements

This final rule implements the longline bigeye tuna catch limit of CMM 2012-01 for U.S. fishing vessels. The limit and associated restrictions apply to U.S. longline fisheries in the WCPO other than those of the three U.S. Participating Territories to the WCPFC – American Samoa, Guam, and the CNMI.

Section 113 Authorization

Because they are integral to this rulemaking, it is important to explain arrangements between fishing vessels and the U.S. Participating Territories, called Section 113(a) arrangements, prior to discussing the rule. These are allowed by section 113(a) of the Consolidated and Further Continuing Appropriations Act, 2012 (Public Law 112-55, 125 Stat. 552 et seq., (continued by Public Law 113-6, 125 Stat. 603, section 110, the Department of Commerce Appropriations Act, 2013)) (hereinafter, “Section 113 authorization”). We refer to the

original law, enacted for 2011 and 2012, as “prior Section 113(a)”; and arrangements authorized under this law are referred to as “Section 113(a) arrangements.”

The Section 113 authorization enables the U.S. Participating Territories of the WCPFC to use, assign, allocate, and manage catch limits or fishing effort limits agreed to by the WCPFC through arrangements with U.S. vessels with permits issued under the Fishery Ecosystem Plan for the Pacific Pelagic Fisheries of the Western Pacific Region (Pelagics FEP). It also further directs the Secretary of Commerce, for the purposes of annual reporting to the WCPFC, to attribute catches made by vessels operating under Section 113(a) arrangements to the U.S. Participating Territories. The Section 113 authorization also establishes specific eligibility criteria for these arrangements. This final rule takes into consideration the provisions of the Section 113 authorization and establishes additional requirements and conditions for catches of vessels under Section 113(a) arrangements to be attributed to the U.S. Participating Territories.

The Section 113 authorization remains in effect until the earlier of December 31, 2013, or such time as the Western Pacific Fishery Management Council (WPFMC) recommends, and the Secretary approves, an amendment to the Pelagics FEP that would authorize U.S. Participating Territories to use, assign, allocate, and manage catch limits of highly migratory fish stocks, or fishing effort limits, established by the WCPFC, and the amendment is implemented via regulations. The WPFMC at its 157th meeting took final action to amend the Pelagics FEP accordingly; however, the amendment has not yet been approved or implemented by NMFS. It is possible the amendment, if approved, will apply in 2013 or 2014, in which case the provisions of the final rule that take into consideration the Section 113 authorization would cease to apply, as the amendment would effectively replace it. The Section 113 authorization may also cease to apply on its own in 2014, if the effective date is not further extended beyond December 31, 2013.

Thus, the regulatory text only implements the provisions for Section 113(a) arrangements for 2013. NMFS would take appropriate action to amend the regulatory text if Section 113(a) arrangements are applicable in 2014.

Establishment of the Limit

For the purpose of this rule, the longline fisheries of the three U.S. Participating Territories are distinguished from the other longline fisheries of the United States (all of which include U.S.-flagged vessels) based on three factors: (1) where the bigeye tuna are landed; (2) the types of Federal longline fishing permits registered to the fishing vessel; or (3) whether the fishing vessel is included in a Section 113(a) arrangement. With respect to the first factor, except for vessels registered for use under valid American Samoa Longline Limited Access Permits, bigeye tuna landed by U.S. vessels in any of the three U.S. Participating Territories will be attributed to the longline fishery of that Participating Territory. However, in order for that attribution, the bigeye tuna: (1) must not be harvested in the portion of the U.S. exclusive economic zone (EEZ) surrounding the Hawaiian Archipelago; (2) cannot be subject to attribution to another U.S. Participating Territory under an existing Section 113(a) arrangement; and (3) must be landed by a U.S. fishing vessel operated in compliance with one of the permits required under the regulations implementing the Pelagics FEP developed by the WPFMC or the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (West Coast HMS FMP) developed by the Pacific Fishery Management Council (i.e., a permit issued under 50 CFR 665.801 or 660.707).

For the second factor, bigeye tuna that are caught by a fishing vessel registered for use under a valid American Samoa Longline Limited Access Permit will generally be attributed to the longline fishery of American Samoa, regardless of where that catch is landed. However, that

bigeye tuna: (1) must not be harvested in the portion of the U.S. EEZ surrounding the Hawaiian Archipelago; (2) cannot be subject to attribution under an existing Section 113(a) arrangement; and (3) must be landed by a U.S. fishing vessel operated in compliance with one of the permits required under the regulations implementing the Pelagics FEP or the West Coast HMS FMP.

NMFS makes this distinction because American Samoa Longline Limited Access Permits are issued only to participants that have demonstrated historical participation in the American Samoa pelagic fisheries, such that the catch may properly be attributed to that territory.

Under the third factor, bigeye tuna that are caught by a fishing vessel that is included in a Section 113(a) arrangement will be attributed to the longline fishery of the appropriate U.S. Participating Territory that is party to the arrangement, subject to certain criteria. The longline fisheries of the United States and its territories operating in the WCPO are managed as discrete fisheries, with separate compilations of catch and effort statistics and separate management measures for each fishery. In order to allow for the orderly administration of these fisheries and consistently attribute catches to the fisheries of the U.S. Participating Territories under eligible Section 113(a) arrangements, NMFS will wait to attribute catches under eligible Section 113(a) arrangements until the date the catch limit will be reached can be forecasted with a fairly high degree of certainty. Thereafter, NMFS will attribute catches to the fisheries of the U.S. Participating Territories under eligible Section 113(a) arrangements starting seven days before the date the U.S. catch limit is forecasted to be reached. This procedure will allow NMFS to properly administer and enforce the specific management requirements for each fishery throughout the year, consistent with the approved Pelagics FEP.

NMFS will prepare forecasts during 2013 and 2014 of the date that the bigeye tuna catch limit will be reached and periodically make these forecasts available to the public, such as by

posting on a Web site. All the forecasts prepared up until the time that catch attribution to the U.S. Participating Territories under Section 113(a) arrangements actually begins will assume that there will be no such catch attribution to the U.S. Participating Territories. Those forecasts are subject to change as new information becomes available. Because of these potential changes, it is necessary to identify a particular forecast for the purpose of determining when catch attribution to the U.S. Participating Territories under eligible Section 113(a) arrangements will begin. For this purpose, NMFS will use the first forecast that indicates the catch limit will be reached within 28 days of the date of preparation of that forecast. The projected catch limit date in this forecast will be called, for the purpose of this final rule, the pre-Section 113(a) attribution forecast date. As soon as NMFS determines the pre-Section 113(a) attribution forecast date, NMFS will evaluate all Section 113(a) arrangements that it has received, based on the eligibility criteria specified below, and calculate a new forecast date for the catch limit, this time excluding from the tally any U.S. catches to be attributed to the U.S. Participating Territories under eligible Section 113(a) arrangements. In order to allow NMFS a reasonable amount of time to complete this process, NMFS will begin attributing catches to the U.S. Participating Territories under eligible Section 113(a) arrangements seven days before the pre-Section 113(a) attribution forecast date and the new forecast date for the catch limit will be calculated based on this attribution start date. At that time, NMFS will also make publicly available a new forecast date on a Web site – the post-Section 113(a) attribution forecast date – and will update that forecast date as appropriate throughout 2013 and 2014 (if Section 113(a) arrangements are applicable in 2014).

There will be no official due date for the receipt by NMFS of potentially eligible Section 113(a) arrangements. However, NMFS will need 14 days to process arrangements that it

receives, so for an arrangement received after the date that NMFS determines the pre-Section 113(a) attribution forecast date, attribution to the appropriate U.S. Participating Territory will start 14 days after NMFS has received the arrangement or seven days before the pre-Section 113(a) attribution forecast date, whichever date is later.

The final rule also includes certain requirements that must be met in order for NMFS to attribute bigeye tuna caught by a particular vessel included in a Section 113(a) arrangement to the longline fishery of a U.S. Participating Territory. First, with the exception of existing arrangements received by NMFS prior to the effective date of the final rule, NMFS will need to receive from the vessel owner or designated representative a copy of the arrangement at least 14 days prior to the date the bigeye tuna were caught. In addition, the arrangement will need to satisfy specific criteria, discussed in detail in the section below.

Any bigeye tuna attributed to the longline fisheries of American Samoa, Guam, or the CNMI as specified above will not be counted against the U.S. limit. All other bigeye tuna captured by longline gear in the Convention Area by U.S. longline vessels and retained will be counted against the U.S. limit of 3,763 mt.

Eligible Arrangements

An arrangement is not eligible for the attribution of bigeye tuna to the U.S. Participating Territories under the terms of the Section 113 authorization unless the arrangement: (1) includes vessels registered for use with valid permits issued under the Pelagics FEP; (2) imposes no requirements regarding where the vessels fish or land their catch; (3) is signed by all the owners of the vessels included in the arrangement, or by their designated representative(s); (4) is signed by an authorized official of the U.S. Participating Territory(ies) or his or her designated representative(s); and (5) is funded by deposits to the Western Pacific Sustainable Fisheries Fund

in support of fisheries development projects identified in a territory's Marine Conservation Plan adopted pursuant to section 204 of the MSA. If NMFS determines that an arrangement does not meet the criteria for eligibility, NMFS will notify the parties to the arrangement or their designated representative(s) of its determination within 14 days of receiving a copy of the arrangement.

Vessels Under one or more Categories for Attribution to the U.S. Participating Territories

Consistent with the statutory language of the Section 113 authorization, any catch of bigeye tuna that is landed by a vessel operating under an eligible Section 113(a) arrangement is attributed to the longline fishery of the U.S. Participating Territory that is a party to the arrangement. Where there is no section 113(a) arrangement, this final rule provides that catch is attributed to the longline fishery either where the catch is landed or, in the case of vessels with an American Samoa Longline Limited Access Permit, to American Samoa, provided that the fish are not harvested in the U.S. EEZ surrounding Hawaii. This final rule clarifies that, notwithstanding the other landing or permit attributions, bigeye tuna that is caught by a vessel included in an eligible Section 113(a) arrangement will always be attributed to the U.S. Participating Territory that is a party to the arrangement on or after the attribution start date. For example, fish harvested on the high seas by a vessel operating under both a Hawaii Longline Limited Access Permit and an American Samoa Longline Limited Access Permit ordinarily will be attributed to American Samoa regardless of where it is landed. However, if the vessel enters into a valid section 113(a) arrangement with a U.S. Participating Territory catch will be attributed to the U.S. Participating Territory that is a party to the arrangement, on or after the attribution start date, regardless of where the catch is landed or whether the vessel has an American Samoa Longline Limited Access Permit.

Announcement of the Limit Being Reached

If NMFS determines that the limit is expected to be reached before the end of 2013 or 2014, NMFS will publish a notice in the Federal Register to announce specific fishing restrictions that are effective from the date the limit is expected to be reached until the end of the 2013 or 2014 calendar year. NMFS will publish the notice of the restrictions at least seven calendar days before the effective date to provide vessel operators with advance notice. Periodic forecasts of the date the limit is expected to be reached will be made available to the public, such as by posting on a Web site, to help vessel operators plan for the possibility of the limit being reached.

Restrictions After the Limit is Reached

(1) Retain on board, transship, or land bigeye tuna: Starting on the effective date of the restrictions and extending through December 31 of that calendar year, it will be prohibited to use a U.S. fishing vessel to retain on board, transship, or land bigeye tuna captured in the Convention Area by longline gear, except as follows:

First, any bigeye tuna already on board a fishing vessel upon the effective date of the restrictions can be retained on board, transshipped, and/or landed, provided that they are landed within 14 days after the restrictions become effective. A vessel that had declared to NMFS pursuant to 50 CFR 665.803(a) that the current trip type is shallow-setting is not subject to this 14-day landing restriction, so these vessels would be able to land fish more than 14 days after the restrictions become effective.

Second, bigeye tuna captured by longline gear can be retained on board, transshipped, and/or landed if they are caught by a fishing vessel registered for use under a valid American Samoa Longline Limited Access Permit, or if they are landed in American Samoa, Guam, or the

CNMI. However, the bigeye tuna must not be caught in the portion of the U.S. EEZ surrounding the Hawaiian Archipelago, and must be landed by a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.801.

Third, bigeye tuna captured by longline gear can be retained on board, transshipped, and/or landed if they are caught by a vessel that is included in an eligible Section 113(a) arrangement, as specified above. Also, these bigeye tuna must be subject to attribution to the longline fishery of American Samoa, Guam, or the CNMI in accordance with the terms of the arrangement, and to the extent consistent with the requirements and procedures set forth in the final rule. However, NMFS must have received from the vessel owner or designated representative a copy of the arrangement at least 14 days prior to the activity (i.e., the retention on board, transshipment, or landing). The advance notification provision will not apply to existing arrangements received by NMFS prior to the effective date of the final rule.

(2) Transshipment of bigeye tuna to certain vessels: Starting on the effective date of the restrictions and extending through December 31 of that calendar year, it will be prohibited to transship bigeye tuna caught in the Convention Area by longline gear to any vessel other than a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.801.

(3) Fishing inside and outside the Convention Area: To help ensure compliance with the restrictions related to bigeye tuna caught by longline gear in the Convention Area, the final rule establishes two additional, related prohibitions that are in effect starting on the effective date of the restrictions and extending through December 31 of that calendar year. First, vessels are prohibited from fishing with longline gear both inside and outside the Convention Area during the same fishing trip, with the exception of a fishing trip that is in progress at the time the

announced restrictions go into effect. In that exceptional case, the vessel still must land any bigeye tuna taken in the Convention Area within 14 days of the effective date of the restrictions, as described above. Second, if a vessel is used to fish using longline gear outside the Convention Area and enters the Convention Area at any time during the same fishing trip, the longline gear on the fishing vessel must be stowed in a manner so as not to be readily available for fishing while the vessel is in the Convention Area. These two prohibitions do not apply to the following vessels: (1) vessels on declared shallow-setting trips pursuant to 50 CFR 665.803(a); or (2) vessels operating for the purposes of this rule as part of the longline fisheries of American Samoa, Guam, or the CNMI. This second group includes vessels registered for use under valid American Samoa Longline Limited Access Permits and vessels landing their bigeye tuna catch in one of the three U.S. Participating Territories, so long as these vessels conduct fishing activities in accordance with the conditions described above; or vessels included in an eligible Section 113(a) arrangement, as specified above, provided that their catches of bigeye tuna are subject to attribution to the longline fishery of American Samoa, Guam, or the CNMI at the time of the activity.

Comments and Responses

NMFS received four sets of comments on the proposed rule. The comments are summarized below, followed by responses from NMFS.

Comment 1: One commenter stated that the catch limit should be 0.5 mt and all longline operations should be prohibited in U.S. waters. Tuna are vanishing from the earth. NMFS should address overfishing and reduce overfishing by 50 percent.

Another commenter requests NMFS end overfishing and set catch limits for all fishing within U.S. jurisdiction, including vessels in the longline fisheries of American Samoa, Guam

and the CNMI. The commenter notes that the rule would establish a 3,763 mt bigeye tuna catch limit for vessels in the U.S. pelagic longline fisheries operating in the WCPO under the authority of the WCPFC Implementation Act, and that the WCPFC Implementation Act authorizes NMFS to promulgate such regulations as may be necessary to carry out the United States' obligations under the Convention and the WCPFC Implementation Act, including recommendations and decisions adopted by the Commission. Nothing in the WCPFC Implementation Act precludes NMFS from setting catch limits lower than specified in recommendations by the Commission. Catch limits for all vessels are imperative given the recent science showing that increases in fishing in the past 16 years have altered the Pacific Ocean ecosystem, perhaps irreversibly. A fourfold increase in hooks in the Hawaii-based deep-set longline fishery during this time period has resulted in a 50% decrease in catch of target big fish like bigeye tuna. As a result of fewer target species being available, discards have increased to an estimated 30-40% of total catch. Current fishing levels are unsustainable and NMFS has a legal and moral mandate to reduce bigeye tuna mortality immediately.

Response: As stated in the preamble to the proposed rule, the WCPFC established the 3,763 mt longline bigeye tuna catch limit for the United States in CMM 2012-01, and NMFS is implementing this catch limit to fulfill the obligations of the United States under the Convention, pursuant to the WCPFC Implementation Act. NMFS notes that it has determined that the stock of bigeye tuna in the Pacific Ocean is subject to overfishing, according to the NMFS stock status determination criteria established in the Pelagics FEP and West Coast HMS FEP, and, pursuant to the separate MSA process, NMFS and the Regional Fishery Management Councils may consider other management actions for this stock that are outside the scope of this rulemaking. However, now NMFS must implement the 3,763 mt catch limit established by the WCPFC in

CMM 2012-01 in order to meet the obligations of the United States as a Contracting Party to the Convention.

Comment 2: The proposed rule includes a lengthy and complex explanation of the context for the proposed rule, implementation of process and deadlines, exceptions, environmental impacts, and regulatory flexibility analysis. The proposed rule also purports to give notice regarding a variety of possible scenarios that may or may not occur later in 2013 or 2014, and which may or may not alter the underlying international, U.S. statutory, or U.S. regulatory regime. This comment does not endorse or disagree with NMFS' explanations or suppositions, but expresses skepticism that the proposed rule provides meaningful notice as to application of the proposed rule, or as to future changes to the proposed rule once adopted in final, should there be material alterations made to the underlying catch limit regime now in effect under international treaty, U.S. law, and U.S. regulatory requirements.

This comment does support the adoption of the bigeye tuna catch limit regulations so long as they continue to confirm and implement the Section 113 authorization. The Hawaii Longline Association will be entering into a new Section 113(a) arrangement that is substantially the same as past Section 113(a) arrangements. The proposed rule does not appear to alter in any way the applicable criteria for a qualifying Section 113(a) arrangement. It would be objectionable for NMFS to intend anything different for Section 113(a) arrangements, because that would conflict with applicable law and because fair notice of a different intent is not given in the proposed rule.

Response: As stated in the preamble to the proposed rule, prior Section 113(a) was in effect in 2011 and 2012, and the requirements for Section 113(a) arrangements in this rule are identical to the requirements for Section 113(a) arrangements specified in the interim final rule to

implement the WCPFC-established longline bigeye tuna catch limit for 2012 (2012 rule; see 77 FR 51709). NMFS is not introducing new procedures for Section 113(a) arrangements in this rule. Moreover, although this rule implements the 3,763 mt longline bigeye tuna catch limit for each of the 2013 and 2014 calendar years, the rule only implements the provisions for Section 113(a) arrangements for 2013, as it is unknown whether Section 113(a) arrangements would be applicable in 2014. NMFS will take appropriate action to amend the regulatory text if Section 113(a) arrangements are applicable in 2014.

Comment 3: The U.S. Department of the Interior provided a letter stating that it had reviewed the proposed rule and had no comments.

Response: NMFS acknowledges the comment.

Comment 4: While the proposed rule ostensibly sets catch limits, it does not apply the limit to vessels in the longline fisheries of American Samoa, Guam, or the CNMI. The practical effect is to allow unlimited bigeye tuna fishing through agreements transferring the U.S. Participating Territories' unlimited quota by virtue of a loophole created by appropriations riders – prior Section 113(a) and the Section 113 authorization. At the meeting concluded on June 28, 2013, the WPFMC recommended that the Pelagics FEP be amended to include a 2,000 mt bigeye tuna longline limit for the U.S. Participating Territories. There is no reason not to implement this recommendation now via the rule.

In addition to setting enforceable bigeye tuna catch limits for all U.S. pelagic longline vessels, NMFS must require 100 percent observer coverage on the deep-set longline vessels, per the recommendations of the U.S. Fish and Wildlife Service (USFWS) in its 2012 biological opinion for the operation of Hawaii-based pelagic longline fisheries. Deep-set longline vessels

currently have 20 percent observer coverage, which is inadequate to monitor protected species interactions.

If NMFS finalizes the proposed rule – allowing unlimited fishing for bigeye tuna – it must reinitiate consultation under Section 7 of the Endangered Species Act (ESA) on the activity’s effects on endangered species such as seabirds, sea turtles, and marine mammals. The most recent biological opinions do not include fishing effort data from 2011 or 2012 – years in which there have been no bigeye tuna limits – and thus, this is new information triggering reinitiation of consultation because the effects of the agency action may affect listed species in a manner or to an extent not considered in prior biological opinions.

Response: This rule implements the longline-related provisions of CMM 2012-01 for the United States’ longline fisheries, pursuant to the WCPFC Implementation Act, as well as the requirements of the Section 113 authorization. As stated in the preamble to the proposed rule, under CMM 2012-01 and its Attachment F, the longline fisheries of American Samoa, Guam, and the CNMI are not subject to longline bigeye tuna catch limits. However, implementing WPFMC recommendations, including the bigeye tuna catch limits for U.S. Participating Territories, must be done by the procedures specified in the MSA, and, if appropriate, would be part of a separate rulemaking pursuant to MSA authority. The WPFMC is currently developing its recommendation for the 2,000 mt catch limits for U.S. Participating Territories for Secretarial review, pursuant to the MSA process. Following transmittal, NMFS will review the amendment for consistency with all applicable law and seek public comment, consistent with the provisions of MSA.

USFWS provided conservation recommendations regarding the amount of observer coverage for the Hawaii-based deep set longline fishery in its 2012 Biological Opinion

(Biological Opinion of the U.S. Fish and Wildlife Service for the Operation of Hawaii-based Pelagic Longline Fisheries, Shallow Set and Deep Set, Hawaii; January 6, 2012). As stated in the 2012 Biological Opinion, conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat (e.g., to help implement recovery plans, or to collect information). USFWS recommended that observer coverage for the deep-set fishery be increased, as funds are available, and that the amount of coverage be increased to 100 percent for vessels fishing within the range of the short-tailed albatross (Phoebastria albatrus). However, NMFS is satisfied that 20% observer coverage is sufficient to provide statistically reliable information with which to assess the fishery's impacts on protected species. Moreover, whether or when to make changes to observer coverage is outside the scope of this rulemaking.

NMFS disagrees that this action triggers reinitiation of formal consultation under Section 7 of the ESA. Section 7(a)(2) of the ESA requires agencies to ensure that their activities are not likely to jeopardize the continued existence of listed species. An agency must reinitiate consultation under ESA section 7(a)(2) whenever one of the four reinitiation triggers under 50 CFR subpart 402.16 is met. The deep-set fishery currently operates under a October 2005 “no jeopardy” Biological Opinion, which determined that the continued authorization of the deep-set longline fishery complies with ESA section 7(a)(2). On June 5, 2013, NMFS considered information relative to fishing effort under the 3,763 bigeye tuna catch limit as well as the potential for increased effort under the requirements of Section 113 authorization, and determined that these changes in the conduct of the fishery have not resulted in adverse effects to listed species or critical habitat that were not considered in the 2005 consultation. Accordingly,

the 2005 Biological Opinion remains valid with respect to those protected species addressed in the consultation.

Moreover, in June 2013, NMFS reinitiated consultation on the deep-set fishery in response to the recent listing of the insular false killer whale under ESA and the deep-set fishery's interaction with one sperm whale. This consultation is ongoing and will consider, among other information, the effects of the continuing operation of the deep-set fishery under the 3,763 mt annual limit as well as the requirements of the Section 113 authorization.

Changes from the Proposed Rule

As discussed above, this final rule clarifies that, consistent with the express requirements of the Section 113 authorization, bigeye tuna catch by a vessel operating under an eligible Section 113(a) arrangement must be attributed to the U.S. Participating Territory party to the arrangement, if caught on or after the attribution start date, notwithstanding where the fish is landed, or whether the vessel is operating under an American Samoa Longline Limited Access Permit. NMFS has included language in the regulatory text to clarify that if a given catch of bigeye tuna is caught by a vessel not operating under an eligible Section 113(a) arrangement but has an American Samoa Longline Limited Access Permit, and the fish is not harvested in the U.S. EEZ around Hawaii, that catch will be attributed to the longline fishery of American Samoa. NMFS has not made any substantive changes to the proposed rule in this final rule.

Classification

The Administrator, Pacific Islands Region, NMFS, has determined that this final rule is consistent with the WCPFC Implementation Act and other applicable laws.

Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

A FRFA was prepared. The FRFA incorporates the IRFA prepared for the proposed rule. The analysis in the IRFA is not repeated here in its entirety.

A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble of the proposed rule and in the SUMMARY and SUPPLEMENTARY INFORMATION sections of this final rule, above. The analysis follows:
Significant Issues Raised by Public Comments in Response to the IRFA

NMFS did not receive any public comments in response to the IRFA.

Description of Small Entities to Which the Rule Will Apply

On June 20, 2013, the Small Business Administration (SBA) issued a final rule revising the small business size standards for several industries effective July 22, 2013 (78 FR 37398). The rule increased the size standard for Finfish Fishing from \$4.0 to 19.0 million, Shellfish Fishing from \$4.0 to 5.0 million, and Other Marine Fishing from \$4.0 to 7.0 million (Id. at 37400 (Table 1)). Pursuant to the Regulatory Flexibility Act, and prior to SBA's June 20 final rule, initial regulatory flexibility analysis was developed for this action using SBA's former size standards. NMFS has reviewed the analyses prepared for this action in light of the new size standards. Under the former, lower size standards, all entities subject to this action were considered small entities, thus they all would continue to be considered small under the new standards. NMFS has determined that the new size standards do not affect analyses prepared for this action.

The final rule will apply to owners and operators of U.S. vessels fishing with longline gear in the Convention Area, except those that are part of the longline fisheries of American Samoa, Guam, or the CNMI. The total number of affected entities is approximated by the number of Hawaii Longline Limited Access Permits (issued under 50 CFR 665.13) that are assigned to vessels (permitted vessels). Under the limited access program, no more than 164 permits may be issued. During 2006-2012 the number of permitted vessels ranged from 130 to 145 (these figures and some other estimates in the remainder of this FRFA differ slightly from previously published estimates because of subsequent updates to the data and/or methods that were used for the estimates). The current number of permitted vessels (as of August 2013) is 130. Traditionally, most of the Hawaii fleet's fishing effort has been in the Convention Area, with the remainder of the effort to the east of the Convention Area, as described below. Owners and operators of U.S. longline vessels based on the U.S. west coast also could be affected by this proposed rule. However, based on the complete lack of fishing by that fleet in the Convention Area since 2005, it is expected that very few, if any, U.S. west coast vessels would be affected.

Most of the Hawaii longline fleet targets bigeye tuna using deep sets, and during certain parts of the year, portions of the fleet target swordfish using shallow sets. In the years 2005 through 2012, the estimated numbers of Hawaii longline vessels that actually fished ranged from 124 to 129. Of the vessels that fished, the number of vessels that engaged in deep-setting in the years 2005 through 2012 ranged from 122 to 129, and the number of vessels that engaged in shallow-setting ranged from 18 to 35. The number of vessels that engaged in both deep-setting and shallow-setting ranged from 17 to 35. The number of vessels that engaged exclusively in shallow-setting ranged from zero to two.

As an indication of the size of businesses in the fishery, average annual ex-vessel revenue for the fleet during 2005-2010 was about \$71 million (in 2012 dollars). Virtually all of those revenues are believed to come from shallow-set and deep-set longlining.

Recordkeeping, Reporting, and Other Compliance Requirements

The final rule will not establish any new reporting or recordkeeping requirements within the meaning of the Paperwork Reduction Act. The classes of small entities subject to the requirements and the types of professional skills necessary to fulfill each of the requirements are described in the IRFA.

Disproportionate Impacts

As indicated above, all of the affected entities are likely to be small entities, so there are not expected to be any disproportionate economic impacts between small and large entities resulting from this final rule. However, as described in the IRFA, there could be disproportionate impacts according to vessel size. The 500 mt eastern Pacific Ocean (EPO) bigeye catch limit for 2013 applies only to vessels greater than 24 m in length overall, so in the event that the WCPO bigeye tuna fishery is closed and the 500 mt limit is reached in the EPO, only vessels 24 m or less in length would be able to take advantage of the alternative opportunity of deep-setting for bigeye tuna in the EPO. On the other hand, smaller vessels can be expected to find it more difficult, risky, and/or costly to fish in the EPO during the relatively rough winter months than larger vessels.

All the affected entities are longline fishing businesses, so there would be no disproportionate economic impacts based on fishing gear. No disproportionate economic impacts based on home port are expected.

Steps Taken to Minimize the Significant Economic Impacts on Small Entities

NMFS explored alternatives that would achieve the objective of this action while minimizing economic impacts on small entities. As described in the RIR prepared for the proposed rule, NMFS analyzed three alternative approaches (called “options” in the RIR) regarding when NMFS would start attributing catches to the U.S. Participating Territories under Section 113(a) arrangements. The rule implements “option 2,” under which NMFS will start attributing catches to the U.S. Participating Territory at a particular point before the U.S. bigeye tuna catch limit is forecasted to be reached. Under “option 1,” the timing of attribution would not be constrained; that is, it would be done according to the terms of the arrangement. Under “option 3,” NMFS would start attributing to the U.S. Participating Territory only after the U.S. bigeye tuna catch limit has been reached. Option 3 would not be less constraining or costly to affected entities than the proposed option. Option 1 would have the potential to be less constraining and costly, since Section 113(a) arrangements could be written such that bigeye tuna is attributed to the Participating Territories starting at any time, including well before the U.S. catch limit is forecasted to be reached. Under option 1, therefore, there would be the potential (depending on the terms of any arrangements) for there to be a lower likelihood of the catch limit being reached than under the proposed option, and thus any constraining effects on the activities of affected entities would be accordingly lower. The magnitude of these differences would depend on the terms of any eligible arrangements. As an extreme example, arrangements could be written such that there is essentially no chance that the U.S. catch limit would be reached, in which case affected entities would be unconstrained by the catch limit and bear no costs as a result of the rule. NMFS favors option 2 and rejects option 1 for the following reasons: In order to allow for the orderly administration of these fisheries and a consistent manner of attributing catches to the fisheries of the U.S. Participating Territories under eligible Section

113(a) arrangements, NMFS believes it important to wait to attribute catches under eligible Section 113(a) arrangements until the date the catch limit would be reached can be forecasted with a fairly high degree of probability. Thereafter, NMFS will attribute catches to the fisheries of the U.S. Participating Territories under eligible Section 113(a) arrangements starting seven days before the date the U.S. catch limit is forecasted to be reached. This procedure will allow NMFS to properly administer and enforce the specific management requirements for each fishery throughout the year, consistent with the approved Pelagics FEP.

NMFS also considered the no-action alternative, which could result in fewer costs than the proposed action for many affected entities (but as described in the IRFA, for some affected entities, the rule could be more economically beneficial than no-action), but NMFS has determined that the no-action alternative would fail to accomplish the objectives of the WCPFC Implementation Act, including satisfying the obligations of the United States as a Contracting Party to the Convention. For that reason, the no-action alternative is rejected.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide has been prepared. The guide will be sent to permit holders in the affected fisheries. The guide and this final rule will also be available at www.fpir.noaa.gov and by request from NMFS PIRO (see ADDRESSES).

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources,
Reporting and recordkeeping requirements, Treaties.

Dated: September 18, 2013.

Alan D. Risenhoover, Director, Office of Sustainable Fisheries,
performing the functions and duties of the Deputy Assistant Administrator
for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart O [Amended]

1. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

Authority: 16 U.S.C. 6901 et seq.

2. Section 300.224 is revised to read as follows:

§ 300.224 Longline fishing restrictions.

(a) Establishment of bigeye tuna catch limit. There is a limit of 3,763 metric tons of bigeye tuna that may be captured in the Convention Area by longline gear and retained on board by fishing vessels of the United States during each of the calendar years 2013 and 2014.

(b) Exception for bigeye tuna landed in territories. Except as provided in paragraphs (c) and (d), bigeye tuna landed in American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands will be attributed to the longline fishery of the territory in which it is landed and will not be counted against the limit established under paragraph (a) of this section, provided that:

(1) The bigeye tuna were not caught in the portion of the EEZ surrounding the Hawaiian Archipelago; and

(2) The bigeye tuna were landed by a fishing vessel operated in compliance with a valid permit issued under § 660.707 or § 665.801 of this title.

(c) Exception for bigeye tuna caught by vessels with American Samoa Longline Limited Access Permits. Except as provided in paragraph (d), bigeye tuna caught by a vessel registered for use under a valid American Samoa Longline Limited Access Permit issued under § 665.801(c) of this title will be attributed to the longline fishery of American Samoa and will not be counted against the limit established under paragraph (a) of this section, provided that:

(1) The bigeye tuna were not caught in the portion of the EEZ surrounding the Hawaiian Archipelago; and

(2) The bigeye tuna were landed by a fishing vessel operated in compliance with a valid permit issued under § 660.707 or § 665.801 of this title.

(d) Exception for bigeye tuna caught by vessels included in Section 113(a) arrangements. Bigeye tuna caught in 2013 by a vessel that is included in an arrangement under the authorization

of Section 113(a) of Public Law 112-55, 125 Stat. 552 et seq., the Consolidated and Further Continuing Appropriations Act, 2012 (continued by Public Law 113-6, 125 Stat. 603, section 110, the Department of Commerce Appropriations Act, 2013), will be attributed to the longline fishery of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, according to the terms of the arrangement to the extent they are consistent with this section and applicable law, and will not be counted against the limit, provided that:

(1) NMFS has received a copy of the arrangement from the vessel owner or a designated representative at least 14 days prior to the date the bigeye tuna was caught, except that this requirement shall not apply to any arrangement provided to NMFS prior to the effective date of this paragraph;

(2) The bigeye tuna was caught on or after the “start date” specified in paragraph (g)(2) of this section; and

(3) NMFS has determined that the arrangement satisfies the requirements of Section 113(a) of Public Law 112-55, 125 Stat. 552 et seq., the Consolidated and Further Continuing Appropriations Act, 2012 (continued by Public Law 113-6, 125 Stat. 603, section 110, the Department of Commerce Appropriations Act, 2013), in accordance with the criteria specified in paragraph (g)(3) of this section.

(e) Announcement of catch limit being reached and fishing prohibitions. NMFS will monitor retained catches of bigeye tuna with respect to the limit established under paragraph (a) of this section using data submitted in logbooks and other available information. After NMFS determines that the limit is expected to be reached by a specific future date, and at least seven calendar days in advance of that specific future date, NMFS will publish a notice in the Federal

Register announcing that specific prohibitions will be in effect starting on that specific future date and ending December 31 of that calendar year.

(f) Prohibitions after catch limit is reached. Once an announcement is made pursuant to paragraph (e) of this section, the following restrictions will apply during the period specified in the announcement:

(1) A fishing vessel of the United States may not be used to retain on board, transship, or land bigeye tuna captured by longline gear in the Convention Area, except as follows:

(i) Any bigeye tuna already on board a fishing vessel upon the effective date of the prohibitions may be retained on board, transshipped, and/or landed, to the extent authorized by applicable laws and regulations, provided that they are landed within 14 days after the prohibitions become effective. The 14-day landing requirement does not apply to a vessel that has declared to NMFS, pursuant to § 665.803(a) of this title, that the current trip type is shallow-setting.

(ii) Bigeye tuna captured by longline gear may be retained on board, transshipped, and/or landed if they are landed in American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, provided that:

(A) The bigeye tuna were not caught in the portion of the EEZ surrounding the Hawaiian Archipelago;

(B) Such retention, transshipment, and/or landing is in compliance with applicable laws and regulations; and

(C) The bigeye tuna are landed by a fishing vessel operated in compliance with a valid permit issued under § 660.707 or § 665.801 of this title.

(iii) Bigeye tuna captured by longline gear may be retained on board, transshipped, and/or landed if they are caught by a vessel registered for use under a valid American Samoa Longline Limited Access Permit issued under § 665.801(c) of this title, provided that:

(A) The bigeye tuna were not caught in the portion of the EEZ surrounding the Hawaiian Archipelago;

(B) Such retention, transshipment, and/or landing is in compliance with applicable laws and regulations; and

(C) The bigeye tuna are landed by a fishing vessel operated in compliance with a valid permit issued under § 660.707 or § 665.801 of this title.

(iv) Bigeye tuna captured by longline gear may be retained on board, transshipped, and/or landed in 2013 if they were caught by a vessel that is included in an arrangement under the authorization of Section 113(a) of Public Law 112-55, 125 Stat. 552 et seq., the Consolidated and Further Continuing Appropriations Act, 2012 (continued by Public Law 113-6, 125 Stat. 603, section 110, the Department of Commerce Appropriations Act, 2013), if the arrangement provides for the bigeye tuna when caught to be attributed to the longline fishery of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, provided that:

(A) NMFS has received a copy of the arrangement at least 14 days prior to the activity (i.e., the retention on board, transshipment, or landing), unless NMFS has received a copy of the arrangement prior to the effective date of this section;

(B) The “start date” specified in paragraph (g)(2) of this section has occurred or passed; and

(C) NMFS has determined that the arrangement satisfies the requirements of Section 113(a) of Public Law 112-55, 125 Stat. 552 et seq., the Consolidated and Further Continuing

Appropriations Act, 2012 (continued by Public Law 113-6, 125 Stat. 603, section 110, the Department of Commerce Appropriations Act, 2013), in accordance with the criteria specified in paragraph (g)(3) of this section.

(2) Bigeye tuna caught by longline gear in the Convention Area may not be transshipped to a fishing vessel unless that fishing vessel is operated in compliance with a valid permit issued under § 660.707 or § 665.801 of this title.

(3) A fishing vessel of the United States may not be used to fish in the Pacific Ocean using longline gear both inside and outside the Convention Area during the same fishing trip, with the exception of a fishing trip during which the prohibitions were put into effect as announced under paragraph (e) of this section, in which case the bigeye tuna on board the vessel may be retained on board, transshipped, and/or landed, to the extent authorized by applicable laws and regulations, provided that they are landed within 14 days after the prohibitions become effective. This prohibition does not apply to a vessel that catches bigeye tuna that is to be attributed to the longline fishery of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands in accordance with paragraphs (b), (c), or (d) of this section, or to a vessel for which a declaration has been made to NMFS, pursuant to § 665.803(a) of this title, that the current trip type is shallow-setting.

(4) If a fishing vessel of the United States, other than a vessel that catches bigeye tuna that is to be attributed to the longline fishery of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, in accordance with paragraphs (b), (c), and (d) of this section, or a vessel for which a declaration has been made to NMFS, pursuant to § 665.803(a) of this title, that the current trip type is shallow-setting, is used to fish in the Pacific Ocean using longline gear outside the Convention Area and the vessel enters the Convention Area at any time

during the same fishing trip, the longline gear on the fishing vessel must, while it is in the Convention Area, be stowed in a manner so as not to be readily available for fishing; specifically, the hooks, branch or dropper lines, and floats used to buoy the mainline must be stowed and not available for immediate use, and any power-operated mainline hauler on deck must be covered in such a manner that it is not readily available for use.

(g) Procedures and conditions for Section 113(a) arrangements. This paragraph establishes procedures to be followed and conditions that must be met in 2013 with respect to arrangements authorized under Section 113(a) of Public Law 112-55, 125 Stat. 552 et seq., the Consolidated and Further Continuing Appropriations Act, 2012 (continued by Public Law 113-6, 125 Stat. 603, section 110, the Department of Commerce Appropriations Act, 2013). These procedures and conditions apply to paragraphs (d), (f)(1)(iv), (f)(3), and (f)(4) of this section.

(1) For the purpose of this section, the “pre-Section 113(a) attribution forecast date” is the date the catch limit established under paragraph (a) of this section is forecast by NMFS to be reached in the calendar year, assuming that no catches would be attributed to the longline fisheries of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands under arrangements authorized under Section 113(a) of Public Law 112-55, 125 Stat. 552 et seq., the Consolidated and Further Continuing Appropriations Act, 2012 (continued by Public Law 113-6, 125 Stat. 603, section 110, the Department of Commerce Appropriations Act, 2013). Since forecasts are subject to change as new information becomes available, NMFS will use for this purpose the first forecast it prepares that indicates that the date of the limit being reached is less than 28 days after the date the forecast is prepared.

(2) For the purpose of this section, the “start date” for attribution of catches to the longline fisheries of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands for a particular arrangement is:

(i) Seven days before the pre-Section 113(a) attribution forecast date, for arrangements copies of which are received by NMFS no later than the date NMFS determines the pre-Section 113(a) attribution forecast date; and

(ii) Seven days before the pre-Section 113(a) attribution forecast date or 14 days after the date that NMFS receives a copy of the arrangement, whichever is later, for arrangements copies of which are received by NMFS after the date NMFS determines the pre-Section 113(a) attribution forecast date.

(3) NMFS will determine whether an arrangement satisfies the requirements of Section 113(a) of Public Law 112-55, 125 Stat. 552 et seq., the Consolidated and Further Continuing Appropriations Act, 2012 (continued by Public Law 113-6, 125 Stat. 603, section 110, the Department of Commerce Appropriations Act, 2013), for the attribution of bigeye tuna to the longline fishery of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands according to the following criteria:

(i) Vessels included under the arrangement must be registered for use with valid permits issued under the Fishery Ecosystem Plan for Pacific Pelagic Fisheries of the Western Pacific Region;

(ii) The arrangement must not impose any requirements regarding where the vessels included in the arrangement must fish or land their catch;

(iii) The arrangement must be signed by the owners of all the vessels included in the arrangement or their designated representative(s);

(iv) The arrangement must be signed by an authorized official of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands or his or her designated representative(s); and

(v) The arrangement must be funded by deposits to the Western Pacific Sustainable Fisheries Fund in support of fisheries development projects identified in the Marine Conservation Plan of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands adopted pursuant to section 204 of the Magnuson-Stevens Fishery Conservation and Management Act.

(4) NMFS will notify the parties to the arrangement or their designated representative(s) within 14 days of receiving a copy of the arrangement, if the arrangement does not meet the criteria specified in paragraph (g)(3) of this section.

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